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No. 91-2024

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1991

LAMB'S CHAPEL and JOHN STEIGERWALD,
Petitioners,

v.

CENTER MORICHES UNION FREE SCHOOL DISTRICT,
LOUISE TRAMONTANO in her official capacity as
President of the Board of Education for
Center Moriches Schools, and
NEW YORK STATE ATTORNEY GENERAL'S OFFICE,
Respondents.

BRIEF OF DEFENDANTS-RESPONDENTS IN OPPOSITION

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COUNTERSTATEMENT OF THE QUESTION PRESENTED

Was not the United States Court of Appeals for the Second Circuit correct when it held that the school property of the Center Moriches Union Free School District falls within the sub-category "limited public forum" the classification that allows it to remain non-public except as to the specified uses as provided in Section 414 of the Education Law of the State of New York and the Local rules of the Center Moriches Union Free School District?

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RESPONDENTS' BRIEF IN OPPOSITION

Respondents respectfully submit that this Court should deny the petition for a writ of certiorari. The petition seeks review of the opinion issued in this case by the United States Court of Appeals for the Second Circuit. The opinion is reported at 959 F.2d 381 (Second Circuit 1992).

COUNTERSTATEMENT OF THE CASE

Respondent, Center Moriches Union Free School (hereinafter "Center Moriches") is a subdivision of the State of New York and governed by the laws of the State of New York in the permissible uses of its school district facilities.

New York State Law authorizes the use of public school facilities for certain specified limited uses as provided in Section 414 of the Education Law of the State of New York.

The Center Moriches Union Free School District has adopted official rules governing the community use of school district facilities. The Center Moriches Union Free District has established a limited public forum that is not open to religious expression or other private use.

Center Moriches has consistently and methodically excluded any private, commercial or religious use from its facilities and indeed requires each applicant for use of school district facilities to certify that the facilities will be utilized in accordance with its rules and regulations. This policy is consistent with the policy expressed in Section 414 of the Education Law of the State of New York which has been construed as precluding use of school district facilities for religious purposes.

In furtherance of the State's intenion to continue to exclude religious activity from the limited public forum of public school districts, the New York State Legislature amended Section 414 of the Education Law in 1991 by adding subsection (j) which will allow the additional use of school district facilities: for graduation exercises held by not-for-profit elementary secondary schools, *provided that no religious service is performed* (emphasis supplied). This legislation took effect July 23, 1991.

In addition to excluding religious uses of school district facilities, the private uses and the use of school district facilities for commercial purposes, is precluded under the provisions of Section 414 of the Education Law of the State of New York and the rules and regulations of the Center Moriches Union Free School District regarding the use of its facilities.

Instead of having established an open forum, the Center Moriches Union Free School District pursuant to the provisions of Section 414 of the Education Law of the State of New York have established a limited public forum restricting the use of the school district facilities to cultural and educational activities consistent with the school district's preservation of the facilities for school related business and the welfare of the community rather than the promotion of a private expression or purpose.

The District Court found that the Center Moriches Union Free School District had not by its policy or practice opened its doors to similar (religious) uses. It is important to note at this point that the Appellants have stipulated that the film series was of a religious nature and the showing was for a religious purpose.

REASONS FOR DENYING THE WRIT

Notwithstanding Petitioners' claim, this case does not present a new issue but rather fits within the prior decisions of this Court which have held that school facilities may be deemed to be public fora only if school authorities have by "policy or practice" opened those facilities for "indiscriminate use by the general public" *Perry Education Association v. Perry Local Educators Association*, 460 U.S. 37, 47 (103 S.Ct. 948, 956, 74 L.Ed.2d 194) (1983), the District Court and the Second Circuit

have both found that the facilities of the Center Moriches Union Free School District did not constitute open fora.

Instead, the District Court found that by enforcing restrictions on access imposed by State Statute and by its regulations, Center Moriches Union Free School District has created a limited public forum, *Lamb's Chapel v. Center Moriches Union Free School District*, 736 F. Supp. at 1251. The District Court ruled that the Center Moriches Union Free School District "has not by policy or practice either opened its facilities to indiscriminate use by the general public or some segment of the public." *Id.*

It is fundamentally flawed premise of the Petitioners that the public schools of New York State are open fora. The Education Law of the State of New York Section 414 does not create or indeed permit open forums. It is a bold contention that New York State having allowed use of its schools for certain limited prescribed uses must now require that the facilities be opened to all applicants.

New York State public schools are at most limited public forums available for only those uses specified in the statute creating that forum. This Court has previously held a designated public forum as not created by government inaction or by its allowance of limited discourse, rather a designated public forum may be designated only by intent. The Courts must look to the policy and practice of government to ascertain whether it intended to designate a place not traditionally open to assembly and debate as a public forum, *Cornelius* 473 U.S. at 802 quoting *Perry* 460 at 46.

A.

COURT OF APPEALS DECISION IS CORRECT AND CONSISTENT WITH PRIOR DECISIONS OF THIS COURT.

The First Amendment right of access does not accrue simply because the subject property is owned or controlled by the government, *United States Postal Service v. Council of Greenberg Civic Association*, 453 U.S. 114, 129 (1981). The State no less than a private owner of property has power to preserve the property under its control for the use to which it is lawfully designated, *Adderly v. State of Florida*, 385 U.S. 39, 47 (1966). Accord *Greer v. Spock*, 424 U.S. 828, 836 (1976).

This Court has recognized that the existence of a right of access to public private and the extent to which the government may place restriction on that right depends on the character of the property or "forum", *Perry Education Association v. Perry Local Educators Association*, 460 U.S. 37, 44 (1983); *Cornelius v. NAACP Legal Defense and Education Fund Inc.*, 473 U.S. 788 (1985).

This Court has recognized a sub-category of the designated public forum as the "limited public forum" which arises when a State designates public private to be used as a forum for some purposes but not others. A forum is thus created only for limited purposes such as use by certain groups or discussion of certain subjects, *Perry*, 460 U.S. at 45 n.7 and 48. See, e.g. *Greer v. Spock*, 424 U.S. at 838 n.10 (Political Candidates excluded from military reservation although other members of the public permitted to speak on other subjects); *Lehman v. City of Shaker Heights*, 418 U.S. 298 (1974) (political advertising excluded from city's transit system although certain types of advertising accepted); *Monterey County Democratic Central Committee v. United States Postal*

Service, 812 F.2d 1194 (9th Circuit 1987) (only non-profit civic leagues or non-partisan organizations permitted to conduct voter registration drives on postal property; partisan voter registration efforts prohibited); *Calash v. City of Bridgeport*, 788 F.2d 80 (2nd Circuit 1986) (municipal auditorium available for use only by charitable and non-profit organizations; profit making organizations excluded).

When public property has been designated a limited public forum, it is considered a public forum only as to speakers for whose benefit the forum was created or "entities of similar character", *Calash*, 788 F.2d at 84 quoting *Perry*, 460 U.S. at 48. The rules of access for such persons or organizations for whose benefit the forum was created are the same as those applicable to traditional and designated public fora. However, in regard to those who are not members of the class intended to be benefitted by the creation of the limited forum, the public private remains a "non-public forum" and the rules of access for such persons and organizations are the same as those applicable to non-public fora, *Calash*, 788 F.2d at 84.

Courts have already acknowledged that public schools are not "traditional public fora". *Brandon v. Board of Education of Guilderland Central School District*, 635 F.2d 971, 980 (2nd Circuit 1980), *cert. denied* 451, U.S. 1123 (1981) (a high school is not a public forum where religious views can be freely aired).

Because New York schools are non-public fora as to non-enumerated uses, Petitioner's inability to obtain use of the school facilities need only to be reasonable and viewpoint neutral. Education Law Section 414 meets both of those requirements.

Although Education Law Section 414 lists nine explicit purposes for which public school property may be used during non-school hours, those purposes may be grouped into two general categories. The first category covers the type of activities which public schools are normally associated, education and activities for children. This category includes Section 414(1)(a) permitting schools to be used for instruction in any branch of education learning or the arts, Section 414(1)(g), permitting schools to be used for instruction of mentally retarded minors in classes provided by a private organization approved by the Commissioner of Education; Section 414(1)(i), permitting schools to be used to provide child care. The second general category includes the remaining six permissible uses set out in Section 414(1) covering social, civic and recreational activities of interest to or for the benefit of the public in general rather than that of specific identifiable groups.

Thus Education Law Section 414 does *not* single out religious uses for exclusion as did the university policy struck down in *Widmar v. Vincent*, 454 U.S. 263 (1981). Religious groups may not obtain access to New York Public Schools for religious purposes for the same reason that precludes labor unions, commercial activities or individuals seeking to utilize the school facilities for private purposes. Uses for private purposes not of interest to or benefit of public in general are precluded under the provisions of Section 414 of the Education Law.

The public/private distinction embodied in Section 414 is the most fundamentally reasonable distinction that can be made concerning access to public property that is not by tradition or designation open to the public in general. It is also reasonable given the Supreme Court's acknowledgement that restriction on access to

non-public fora may be imposed for purposes of avoiding controversy or the appearance of favoritism *Cornelius*, 473 U.S. at 811; *Lehman*, 481 U.S. at 304.

In addition to being reasonable, the non-inclusion of religious use on the list of permitted uses is also viewpoint neutral. The unavailability of access is not based on objection to the particular tenets of the applicant religious group. There is no discretion under Section 414 to grant permits to any religious group for religious use or other private purposes. The interest advanced by the applicants seeking a religious use permit is a private interest not a public one and therefore does not resemble the general category of uses permitted under Section 414.

Section 414 does not demonstrate hostility to religion or otherwise foster an entanglement with religion. Unlike the restrictive policies struck down in cases cited by appellants which after opening their fora for a wide spectrum of general uses expressly excluded religious use, New York Section 414 does not "carve out specific exclusions for speech with religious content" or "actively seek to exclude religious speech or religious groups from a public forum open to all others" or "suppress religious speech", rather Section 414 simply does not confer on a religious use the benefit of access to New York public schools, a benefit also not conferred on any other use not designated by statute.

The exclusion of petitioners from New York public schools is constitutionally permissible in regard to appellants' claim of a right of access, it also passes constitutional muster in regard to petitioner's equal protection claim. A claim of denial of equal access "fairs no better in equal protection garb" than "when cast as a First

Amendment argument" *Perry*, *supra* 460 U.S. at 54. When as in the case of a non-public forum an applicant has no fundamental right of access protected by the constitution, equal protection requires that only the applicant's exclusion from the forum be reasonable, *Id.* at 54-55. When an exclusion is reasonable for purposes of free speech clause of the First Amendment it is also reasonable for purposes of the equal protection clause of the Fourteenth Amendment, *Id.* at 54.

B.

THE COURT OF APPEALS DECISION IS CORRECT AND NOT IN CONFLICT WITH ANY DECISIONS OF ANY OTHER CIRCUITS.

The Second Circuit held that the Center Moriches Union Free School District facilities were "limited public forums" which had not been opened to religious groups by policy or practice. The Court therefore concluded that the facilities property were barred to the plaintiffs in accordance with the New York Education Law Section 414 and the school districts only local rules. This decision is consistent with the decisions of other circuits. Petitioners refer to the decision of *Grace Bible Fellowship Inc. v. Maine School Administrative District No. 5*, 941 F.2d 45 (First Circuit 1991). In that case the District Court had found that the local school board's policy was that "any group may use the (school) facilities as long as they do not seek to propagate or propound a religious message", 941 F.2d at 46. The Court determined that the permission extended by the school district to other activities was "so broad that it created a public forum" (*Id.*). As distinguished from Section 414 the policy in *Grace Bible Fellowship* expressly excluded religious uses (*Id.*). In fact the school district there was unable to cite a single example of a refusal of access to

any group *other* than religious organizations, *Id.* at 47; contrast New York Education Law Section 414 where the use of school district facilities has been denied for any private or commercial use. The school district in *Grace Bible Fellowship* had also granted access for activities, such as (non-religious) fund raising (*Id.*), that would be barred from New York schools by Section 414.

Similarly Petitioners rely on *Gregoire v. Centennial School District*, 907 F.2d 1366 (Third Circuit 1990) which turned on a factual finding that the sc ool district "by its policy and practice created a designated open forum". 907 F.2d at 1369. The decision was not based upon State Law, *Id.* at n.1, but only upon the facts of the case which showed that the school district had allowed a wide range of uses, including some religious uses but not others, *Id.* at 1373-76. Among its uses it had allowed which would be precluded under Section 414, were meetings of labor unions and commercial profit making ventures or those which charge admission. Again, unlike Section 414, the practice of the school district in *Gregoire* expressly excluded religious uses, *Id.* at 1372-73.

Consequently "on the facts of this case", *Id.* at 1378, the Third Circuit found that school district had created designated open forum that could not be denied based on the content of one particular religious group's intended speech. The Court described its holding as a narrow one, which is summarized as requiring the school district to "be consistent in granting facilities access", *Id.* at 1379.

Petitioners further cite *Knights of the Ku Klux Klan v. East Baton Rouge Parish*, 578 F.2d 1122. In that case the Court found that the policy adopted by the school board discriminated among applicants on the basis of the

content of the ideas of the applicant and on their membership and meeting attendance policies. The Court went on to find that the school district had established a public forum. Petitioners cite *Concerned Women for America v. Lafayette County*, 883 F.2d 32 (Fifth Circuit 1989) wherein the Fifth Circuit upheld a preliminary injunction against a policy of access to a public library that excluded meetings *only* for "a religious or political purpose". 883 F.2d at 33. The Court found that the library as a matter of fact had been opened to groups "having little to do with the library's educational and artistic mission", *Id.* at 34 and therefore had created a public forum that could not be denied to other groups on the basis of content. Among the non-religious uses to which the library had been put and which would likely be barred in New York by Education Law Section 414 were a closed meeting of New York Navy recruiters (compare Section 414(1)(c), which required that meetings "pertaining to the welfare of the community" be "open to the public"), and a United Way meeting at which discussion was held of its funding request and budget.

Thus it is clear that the key aspect of the present case is the specific policy and practice of the State of New York and the Center Moriches Union Free School District in particular in designating the specific uses which are permitted on public school facilities, rather than creating open forums, has created a limited open forum for the uses designated in Section 414 of the Education Law of the State of New York and those uses only.

C.

THE STATE, IN ADDITION TO TIME, PLACE AND MANNER OF REGULATIONS, MAY RESERVE THE FORUM FOR ITS INTENDED PURPOSES, COMMUNICATIVE OR OTHERWISE, AS LONG AS THE REGULATION ON SPEECH IS REASONABLE AND NOT AN EFFORT TO SUPPRESS EXPRESSION MERELY BECAUSE PUBLIC OFFICIALS OPPOSE THE SPEAKER'S VIEW.

It is clear that the constitution does not require equal access to a limited open forum. A State may properly restrict the designated uses of a forum *U.S. v. Kokinda*, 110 S.Ct. 3115 (1990) and *Perry, supra.*

Neither does the establishment clause require unrestricted access to government facilities and a government is permitted to designate the uses as long as such designation is mutual. The policy in New York as espoused in Section 414 of the Education Law is not discriminatory but applies regardless of the speaker. Neither by tradition nor purpose can the public schools be described as satisfying the standards that this Court has previously set forth by identifying a public forum. The Center Moriches Union Free School District public school facilities are such public properties that unrestricted expressive activity is incompatible. They are among those publicly owned facilities that could be closed all except those who have legitimate business there. Government in appropriate circumstances may regulate conduct even if the conduct has an expressive content.

CONCLUSION

For the foregoing reasons the petition for a writ of certiorari should be denied.

Respectfully submitted,

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